**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: JUN 2 7 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth W. Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION**: The employment-based immigrant visa petition was initially approved by the Director, Nebraska Service Center. On May 5, 2010 the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is an IT business. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had multiple Form I-140 petitions, either pending or approved but not yet adjusted, and that the petitioner had failed to demonstrate that it had the continuing ability to pay all the approved of the beneficiaries' wages beginning on the priority date of the visa petition. The director revoked the approval of the petition accordingly.

On appeal, counsel for the petitioner contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the petitioner has the ability to pay the proffered wage as of the priority date.

As noted above, the Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this

> section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 8, 2010 revocation, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the

form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on December 24, 2003. The proffered wage as stated on the Form ETA 750 is $75,978.00 per year. The Form ETA 750 states that the position requires a master's degree or the equivalent in computer science, engineering, science, technology, statistics or a related field and three years of experience in the job offered or in a related occupation.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on April 25, 1997, and stated that it currently employs 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted copies of the

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

beneficiary's IRS Forms W-2, Wage and Tax Statement and a W-2 preview, as shown in the table below:

- In 2009, IRS Form W-2 stated total wages of $55,548.00 (a deficiency of $20,430.00).
- In 2010, IRS Form W-2 stated total wages of $77,985.00.
- In 2011, IRS Form W-2 stated total wages of $77,742.00.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd,* No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The proffered wage in the instant matter is $75,978.00. The petitioner's 1120S[2] tax returns demonstrate its net income as shown in the table below:

- In 2003, the Form 1120S stated net income of $117,214.00.
- In 2004, the Form 1120S stated net income of $124,021.00.
- In 2005, the Form 1120S stated net income of $111,206.00.
- In 2006, the Form 1120S stated net income of $100,506.00.
- In 2007, the Form 1120S stated net income of $181,919.00.
- In 2008, the Form 1120S stated net income of $132,039.00.
- In 2009, the Form 1120S stated net income of $150,456.00.
- In 2010, the Form 1120S stated net income of $125,602.00.
- In 2011, the Form 1120S stated net income of $204,321.00.
- In 2012, the Form 1120S stated net income of $582,446.00.

Although the net income amounts exceed the difference between wages paid to the beneficiary and the proffered wage amount in 2009 to 2011, and the proffered wage amount in 2003 to 2008 and 2012, USCIS electronic records indicate that the petitioner has filed over 300 immigrant and non-immigrant petitions since the petition in the instant matter was filed in December 2003. The AAO notes that the petitioner submitted documentation concerning a number of other beneficiaries employed by the petitioner; however, it appears that the petitioner has additional beneficiaries that it has not accounted for out of the multiple filings. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, the petitioner must produce evidence

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 750B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

The director issued a NOIR dated May 5, 2010 to the petitioner indicating that electronic records showed that the petitioner had 36 approved petitions that needed to be accounted for. In response to the director's NOIR, the petitioner submitted a copy of letters requesting that nineteen Forms I-140 petitions be withdrawn, and the petitioner stated that seven beneficiaries had adjusted status. On appeal, the AAO issued a Request for Evidence (RFE) dated March 27, 2013 requesting further evidence of ability to pay and clarification of representation issues. In response to the AAO's RFE, the petitioner submitted a copy of three requests for withdrawal of Form I-140 petitions dated June 19, 2012, March 13, 2012, and April 1, 2013, and addressed to the Texas Service Center. Although the petitioner submitted letters requesting the withdrawal of twenty-two Form I-140 petitions, it is still responsible for an accounting – wages paid to those beneficiaries – through the actual withdrawal dates, in order to accurately assess its ability to pay all of the proffered wage amounts during the relevant years.

In this case, the AAO will analyze whether the director had good and sufficient cause to revoke the petition's approval as of the date of the approval. If the petitioner establishes the ability to pay the beneficiary and the other sponsored workers as of the date of the petition's approval, December 11, 2006, then the director would have erred in revoking the approval of the petition based on the petitioner's ability to pay.

USCIS records reflect that the petitioner filed 27 Form I-140 petitions before December 11, 2006, the date of the petition's approval. Of these, the petitioner filed five of the Form I-140 petitions before the priority date in this case, December 24, 2003. In response to the AAO's Notice of Intent to Deny (NOID), dated April 30, 2013, the petitioner listed only four petitions that had been filed prior to December 2006; and two of these were filed prior to the priority date as follows: [3]

| RECEIPT NUMBER | PRIORITY DATE | PROFFERED WAGE AMOUNT |
|---|---|---|
| | Priority Date December 24, 2003 | Proffered Wage $75,978.00 |
| | Priority Date October 30, 2012 | Proffered Wage $75,978.00 |
| | Priority Date January 9, 2006 | Proffered Wage $71,947.20 |
| | Priority Date November 4, 2002 | Proffered Wage $93,350.00 |

[3] For purposes of this decision only, the AAO will analyze the petitioner's ability to pay the proffered wage based on the information submitted by the petitioner in response to the RFE reflecting that it had filed only four petitions prior to December 2006.
[4] This is the current petition.

There is no evidence in the record to demonstrate that the petitioner paid any part of the proffered wage amount as listed above. The petitioner must demonstrate its ability to pay all proffered wage amounts, even where it can show that the beneficiaries' petitions have been withdrawn or where the beneficiaries adjusted after December 2006, until the respective dates of withdrawal of the petition and/or when the petition is either approved or denied. In this matter, the petitioner submitted information for the four receipt numbers listed above as follows:

| YEAR | NET INCOME | NET CURRENT ASSETS | WAGES OF BENEFICIARIES[5] |
|---|---|---|---|
| 2003 | $117,214.00 | $100,190.00 | $169,328.00 |
| 2004 | $124,021.00 | $128,558.00 | $169,328.00 |
| 2005 | $111,206.00 | $105,083.00 | $169,328.00 |
| 2006 | $100,506.00 | $106,114.00 | $317,253.00 |

Thus, the combined proffered wage amount for the four beneficiaries, $317,253.00 in 2006 and $169,328.00 in 2003, 2004, and 2005, is greater that the petitioner's net income or net current assets for that year. Therefore, the petitioner has submitted insufficient evidence to establish the petitioner's ability to pay the proffered wage to all beneficiaries from 2003 through 2006. Thus, using only information provided by the petitioner, the petitioner has not established the ability to pay the proffered wage from the priority date.

The petitioner provided evidence to demonstrate that seven of its beneficiaries had adjusted status. However, many of the adjustment dates (which are a part of the record) are subsequent to the date of approval of the instant petition, December 11, 2006. There has been insufficient evidence provided to demonstrate that prior to the date of the adjustment of these beneficiaries the petitioner had sufficient income to pay all of the proffered wage amounts.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its net current assets as shown in the table below:

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[5] In 2003 through 2005 the petitioner indicates that it had sponsored two workers, the beneficiary in the instant petition (LIN 06 188 52374) and one other (LIN 11 907 43074). In 2006 the petitioner indicates that it had sponsored a total of four workers.

[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2003, the Form 1120S stated net current assets of $100,190.00.
- In 2004, the Form 1120S stated net current assets of $128,558.00.
- In 2005, the Form 1120S stated net current assets of $105,083.00.
- In 2006, the Form 1120S stated net current assets of $106,114.00.
- In 2007, the Form 1120S stated net current assets of $253,344.00.
- In 2008, the Form 1120S stated net current assets of $54,936.00.
- In 2009, the Form 1120S stated net current assets of $89,562.00.
- In 2010, the Form 1120S stated net current assets of $89,562.00.
- In 2011, the Form 1120S stated net current assets of $166,842.00.
- In 2012, the Form 1120S stated net current assets of $419,854.00.

Although the net current asset amounts exceed the difference between wages paid to the beneficiary and the proffered wage amount in 2009 to 2011, and the proffered wage amount in 2003 to 2008 and 2012, as noted above, because of the multiple petition filings, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. And as noted above, the evidence provided by the petitioner fails to demonstrate the petitioner's ability to pay all beneficiaries' wages as of the priority date in December 2003 or as of the petition's approval in December 2006.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary of the instant petition the proffered wage as of the priority date while continuing to meet its wage obligations to all sponsored beneficiaries through an examination of wages paid to the four beneficiaries noted by the petitioner, or its net income or net current assets. The AAO finds that the director had good and sufficient cause to initiate revocation proceedings and to revoke the approval of the petition.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that the petitioner has provided evidence sufficient to show that it has the ability to pay the proffered wage. Counsel further asserts that the petitioner's bank statements; the petitioner's owner's home equity line of credit, real estate assets, the value of other businesses owned by the petitioner's owner, and other personal assets should be taken into consideration in weighing the totality of the circumstances in this matter. The petitioner submits as evidence on appeal a copy of the petitioner's bank statements and evidence of the petitioner's owner's real estate holdings.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank

statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel infers that the petitioner's owner's assets should be considered in assessing the petitioner's ability to pay the proffered wage. However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

In a similar case, the court stated "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Therefore, the petitioner's owner's personal assets, including other businesses that he owns, will not be considered.

The petitioner submitted a copy of a summary of the petitioner's owner's real estate holdings with estimated equity values. Regarding the property values, real estate is not a readily liquefiable asset. In addition, it is highly speculative to claim funds granted from such a sale would be available specifically for paying the petitioner's payroll. It is unlikely that the petitioner's owners would sell such significant assets to generate the necessary funds to maintain the petitioner's workforce. It is highly speculative to state the value of a certain parcel of real property on the open market. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel infers that the petitioner's owner's home equity line of credit should be considered in determining the petitioner's ability to pay the proffered wage. Contrary to counsel's claim, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment T*erms, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets.

Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel asserts that under *Matter of Great Wall, Id.* the petitioner's job offer would be validated if it can be shown that the beneficiary is replacing a former employee and is assuming that employee's salary. Counsel further asserts that the petitioner's IRS Forms 1120S tax returns page 1, line 19 (other deductions) show that it made payments to "outside services" in 2006 for $800,341.00, in 2007 for $640,253.00, in 2008 for $926,219.00, and in 2009 for $1,143,407.00. Counsel further asserts that the petitioner hired an individual through a corporation "corp to corp" to provide software engineering services to the petitioner's clients who the beneficiary will be replacing. The petitioner submitted as evidence a letter of intent, partnership agreement, corporate agreement, and a proposal. However, none of the evidence provided specifically names these outside service workers, nor does it state specific wages paid to these workers, or verify that their employment was full-time employment. Furthermore, based upon the petitioner's 2006, 2007, 2008, and 2009 tax returns, it appears that the amounts paid to "outside services" has increased over the years despite the fact that the petitioner paid wages to the beneficiary in 2009 and 2010.

There is no evidence in the record to demonstrate that the petitioner has replaced or will replace the outside workers with the beneficiary. Furthermore, in general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the outside workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who allegedly performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. In addition, the beneficiary presumably is not the only software engineer that the petitioner intends to employ or continues to employ; and therefore, the petitioner has not demonstrated that the beneficiary is the one to replace outside workers.[7] Doubt cast on any aspect of the petitioner's proof may, of course, lead

[7] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel contends that the petitioner has gross income and gross receipts, and wages paid to other employees that exceed the proffered wage amount. Contrary to counsel's claim, reliance on gross income or gross assets is misplaced. *See e.g. Taco Especial.* Such a calculation would overstate the petitioner's ability to pay the wage by ignoring expenses and other obligations or liabilities. As noted above, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel's assertions and the evidence presented on appeal do not outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence

relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner has not submitted sufficient evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. It is not realistic that the petitioner could have paid the proffered wage to all of the beneficiaries, assessing the totality of the circumstances.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a master's degree or equivalent in computer science, computer science and engineering, "EE/Eng/Sci/Tech/Stats/related" and three years of experience in the job offered or in a related occupation, "Sr S/W Eng/MemTechStaff Proj/Manager/Sr Sys Eng Programmer/Analyst." Alternatively, the employer noted that in lieu of a master's degree or equivalent and three years of experience, it would accept a bachelor's degree or equivalent and five years of work experience.

On the labor certification, the beneficiary claims to qualify for the offered position based on a bachelor's degree in computer science and engineering from the [redacted] India received in April 1990, and more than five years of work experience. The record contains a

copy of the beneficiary's claimed degree from the [redacted] However, the record does not contain any transcripts or other records confirming the award of a bachelor's degree to the beneficiary. In order to establish that the beneficiary has been awarded a college or university degree, the petitioner must submit "an official college or university record showing the date the [degree] was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii). It cannot be concluded that a copy of a degree submitted as evidence complies with this regulation.

Furthermore, the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record of proceeding contains copies of letter of employment offers, letters of congratulations, letters of employment confirmation, letters of appointment, letters of revised salaries, letters of recognition, and letters of resignation. However, this evidence does not comport with 8 C.F.R. § 204.5(l)(3)(ii)(A) for purposes of establishing the beneficiary's employment experience.

The record also contains a letter from a senior specialist of [redacted] who stated that the company employed the beneficiary since its inception in June 1997 and describes the various projects and duties performed by the beneficiary. This letter is insufficient in that the declarant failed to specify the beneficiary's job title, the specific dates of the beneficiary's employment, and whether his employment was full-time.

The record contains an employment letter from a manager/administrator of [redacted] who stated that the beneficiary joined the company on April 2, 1990 as a senior software engineer, and lists the beneficiary's gross total monthly emoluments. This letter is insufficient to demonstrate the beneficiary's employment experience in that the declarant fails to specify the beneficiary's dates of employment and his job duties performed.

The record also contains an employment letter from the secretary of the [redacted] who stated that the company employed the beneficiary as a software engineer from June 1992 to November 1994. The declarant also described the beneficiary's job duties. The AAO accepts this letter as evidence of the beneficiary's qualifying employment for two years and five months.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is December 24, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

Accordingly, it has not been established that the beneficiary has the requisite education and five years of progressive post-baccalaureate experience in the job offered or that he is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an alternative grounds for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER**: The appeal is dismissed.